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No.

In the Supreme Court of the United States

October Term, 1981

NORTHERN NATURAL GAS COMPANY, NORTHERN HELEX COMPANY, and NORTHERN GAS PRODUCTS COMPANY, *Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*

and

UNITED STATES OF AMERICA, *Intervenor.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In the valuation trial of this case, the trial court found, as a fact, that the reasonable value of helium was $.60 to $.70 per mcf. during the period 1961-1972, based upon, *inter alia,* comparable sales during such period. The Court of Appeals for the Tenth Circuit, reversed and established a "floor" of $2.00 per mcf., as the reasonable value, based upon an implied contract which it found to exist between Petitioners and the United States Government, contrary to an opposite finding by the trial court. The Court of Appeals directed a new trial be held applying the "work-back" method of valuation which it adopted in another case in which Petitioners were not parties. Such work-back had been rejected as inappropriate by the trial court herein. The Appeals Court decision was rendered by a panel some four and one-half years after the case was argued and submitted to the Court *en banc.* Under these circumstances, the questions presented are,

1) Whether the Court of Appeals for the Tenth Circuit Violated Due Process by

(a) Abating Petitioners' case without notice and hearing?

(b) Terminating its *en banc* Court 4-1/2 years after submission and reassigning the case to a 3-judge panel?

(c) Applying as the "law of the case" a decision in another case in which Petitioners were neither parties nor in privity?

(d) Permitting an issue, with respect to which there is material dispute, to be raised for the first time on appeal?

(e) Creating an implied contract liability, contrary to the terms of the written instrument between Northern Helex and the United States?

(f) Mandating a work-back method of valuing helium, the effect of which will be to deny Petitioners their costs of operation thus confiscating their property?

(g) Applying federal common law so as to impose liability against private parties and the United States?

2) Can the Natural Gas Act and the Helium Act Amendments of 1960 be reconciled without abrogating the price provisions of the gas purchase contracts involved herein?

LIST OF PARTIES

Throughout the proceedings below, the parties for convenience have been categorized as follows: Petitioners were included in a group referred to as the Helex Group.[1] The Lessee-Producers Group includes parties as representative of more than 500 independent producers who produce natural gas sold to the Helex Group from which helium is extracted and sold to the United States pursuant to contracts negotiated under the Helium Act Amendments of 1960.[2] The Landowners Group is made up of over 1000 named parties representing more than 30,000 persons who granted the oil and gas leases under which the helium-bearing natural gas is produced. They are listed in Appendix A660.

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1. Panhandle Eastern Pipe Line Company; National Helium Corporation; Northern Natural Gas Company; Northern Helex Company; Northern Gas Products Company; Cities Service Gas Company; Cities Service Helex, Inc.; Cities Service Cryogenics, Inc.

   (a) Northern Natural Gas Company, Northern Helex Company and Northern Gas Products Company are divisions or subsidiaries of InterNorth, Inc.

2. Cabot Corporation; Ashland Oil & Refining Company; Dorchester Gas Producing Company; Mobil Oil Corporation; Cities Service Oil Company (now Cities Service Company); Gulf Oil Corporation; Pan American Petroleum Corporation; Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company; Phillips Petroleum Company; Amoco Production Company; Atlantic Richfield Company; Helmerich & Payne, Inc.; Texaco, Inc.

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OPINIONS BELOW

The opinion of the district court (valuation) is reported at 393 F. Supp. 949. (Appendix B) The opinion of the Court of Appeals for the Tenth Circuit (valuation), affirming in part and reversing in part, is reported at 666 F.2d 1279. (Appendix A) The original district court decision (liability) is reported at 292 F. Supp. 619. (Appendix D) The opinion of the Court of Appeals for the Tenth Circuit (liability), affirming in part and reversing in part, is reported at 441 F.2d 704. (Appendix C) Certiorari was denied at 404 U.S. 1063, with Justices Blackmun and Stewart voting to grant certiorari, Justice Powell took no part.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit (valuation) was entered November 16, 1981. (Appendix A) The order denying petitions for rehearing and suggestion for rehearing *en banc* was entered on January 19, 1982. This Petition for Certiorari was filed within 90 days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Fifth Amendment. (Appendix GG)

Natural Gas Act, 52 Stat. 821, as amended, §§1(b) and 4(c), 15 U.S.C. Sec. 717(b) and 717c. (Appendix GG)

Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. 167-167n. (Appendix GG)

STATEMENT OF THE CASE

Jurisdiction of these consolidated class actions was invoked pursuant to 28 U.S.C. 1335 and 2361. The unreported district court interlocutory order finding jurisdiction was affirmed by the Court of Appeals for the Tenth Circuit in 1964, reported at 327 F.2d 1003. (Appendix F)

On August 15, 1961, Helex, Inc. (now Northern Helex Company), after arm's length negotiations covering several months, entered into a contract with the United States acting through the Director of the Bureau of Mines of the Department of the Interior, providing for the extraction and sale of crude helium to the United States, such contract

being authorized by the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. Sec. 167, et seq. (Appendix A237, NN) The plant was to be built at a central point on the Northern Natural Gas Company interstate gas pipeline. The helium content in the natural gas streams involved here is about .4% of the total volume at the wellhead. (Appendix A217) Producer sales to the pipeline are in interstate commerce for resale. (Appendix A278) Although the word "helium" is not used in the granting clause of the standard gas purchase contract (Appendix A264), the Petitioners, for many years had been purchasing and paying for the full gas stream, under granting clause language conveying title to all the gas produced, or raw natural gas without removal of constituent, or words of similar import. (Appendix A260-A264) The plant went on stream in late 1962. (Appendix A237)

1. The terms of the Northern Helex-United States Government contract.

The Northern Helex Company-United States contract provided for an initial unit price of $11.24 per mcf. for helium contained in the crude helium gas mixture delivered to the United States. The term was 22 years. The amount was the full helium production, subject to limitations not here material. Seller warranted title to the crude helium mixture (about 70% helium and 30% nitrogen). The contract also provided that the United States would indemnify Northern Helex for amounts such company paid in satisfaction or settlement of ownership claims to helium to the extent that such payments exceeded approximately $3.00 per mcf. of helium. (Appendix A238-A239-A240) Other government contracts, with generally identical provisions, were entered into with National Helium Corporation, Cities Service Helex, Inc. and Phillips Petroleum

Company. (Appendix A237-A238) The helium extractors are referred to as the Helex Group.

2. The interpleader actions.

These actions in the nature of interpleader were commenced in 1963 by Petitioners and the other Helex Companies, except Phillips,[3] to resolve claims by Producers and Landowners to a fund consisting of the sales price of the helium to the government. (Appendix A171, A199) All three of the Helex Group vigorously contested these claims. The United States participated as a defendant in Tucker Act and Tort Claims actions brought by the Landowners, alleging inverse condemnation and conversion, which were consolidated with the interpleader cases. (Appendix A186-A187) Classes of Landowners and Lessee-Producers were established covering the wide multi-state area of Kansas, Colorado, Oklahoma and Texas. (Appendix A187-A196)

After a comprehensive trial (Appendix A138), the trial court denied the claims by Landowners and Lessee-Producers against the fund. It held that the oil and gas leases covered (except as reserved) the full gas stream including the helium constituent. (Appendix A296) The court held that payment by Petitioners to the producers had already been made under gas purchase contracts covering the full gas stream including the helium constituent. (Appendix A298) The court also denied the Tucker Act and Tort Claims actions against the United States. (Appendix A299)

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3. Phillips Petroleum Company, although a Helex Company, appears in these cases as a Lessee-Producer.

3. The Court of Appeals for the Tenth Circuit in Consolidated Helium I.

Upon appeal to the Court of Appeals for the Tenth Circuit, the judgments were severally reversed and the cases remanded to the district court. (Appendix A351, A377) Such court was directed to determine reasonable value at the wellhead of the helium constituent extracted by Petitioners and sold to the United States.

Although the Court held that helium was covered by the leases (Appendix A151-153) and the gas purchase contracts between the Lessee-Producers and the interstate pipelines (Appendix A158), and affirmed the district court's holding denying the Tucker Act and Tort Claims action against the United States (Appendix A161-A168), it also held that the Lessee-Producers had not been paid therefor because payment had been made under FPC rates. (Appendix A161-A168) Section 11 of the Helium Act Amendments provides that the Federal Power Commission has no jurisdiction over the sale, extraction, processing, transportation or storage of helium either prior to or subsequent to its separation from the natural gas with which it is commingled. (Appendix A159) This provision was added to the legislation because, with the risks involved in the helium program, private industry would probably not have participated if the companies could only make a public utility rate of return on their investment. (Appendix A674)

The Court held that Section 11 of the Helium Act Amendments required the conclusion that the FPC service rates, under which payment had been made to the Producers for the full gas stream, do not apply to deny additional recovery for the helium extracted in the Helex plants. (Appendix A168)

4. The District Court on remand.

In the second district court trial (valuation), the Landowners and Lessee-Producers contended only for a work-back[4] (Appendix A74-A78), resulting in values ranging from $7.77 to $12.64 per mcf. of helium extracted by Northern Helex (and widely differing results for the other two Helex Companies). (Appendix A72) The government intervened to take the position that the reasonable value of helium, if any, was nominal. (Appendix A42) The district court found there were markets for the commingled helium as it passed from the wellhead to the pipeline companies, and from pipeline companies to the government, private and conservation helium extraction plants (Appendix A100) and rejected the Landowners' and Lessee-Producers' work-back as simply unreasonable. (Appendix A101) The district court, upon the consideration of all the wide range of evidence before it (including comparable sales, expert opinion testimony,[5] and work-backs) found that the reasonable value of helium was $.60 to $.70 per mcf. over the period from 1961 to 1972. (Appendix A105) The district court also found that the

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4. A "work-back" is a secondary valuation device sometimes relied upon where primary valuation methods, such as comparable sales, are not available. Under this method, a point is selected where there can be determined an established price and the costs of processing or beneficiation are deducted to move back to the place where the value must be established. (Appendix A444)

5. Dean Bowers, Helex witness, an expert in process engineering and economic evaluation, analyzed sales of helium bearing gas to five private and government extracting plants to determine what portion of the price paid for the gas was attributable to the purchase of the helium extraction rights. By quantifying and "peeling" off non-comparable attributes in the contracts, Mr. Bowers was able to show comparability in the remainder. Bower's final estimate of the market value of commingled helium was between $.61 and $.75 per mcf. However, the district court based its findings and judgment of $.60 and $.70 per mcf. on the complete record. (Appendix A104-A105)

indemnification provision in the Northern Helex-United States contract was not third party beneficiary in nature, but inured solely to the benefit of Northern Helex and not third parties, and was thus irrelevant to the determination of "reasonable value." (Appendix A100) In the earlier trial, the district court had made a similar finding. (Appendix A211)

5. The first district court trial in Ashland.

In the meantime, the trial in another lawsuit (in which Petitioners were not parties) in the Northern District of Oklahoma had been completed and appeals to the Court of Appeals for the Tenth Circuit perfected. In such action (Appendix T), a diversity case commenced by Ashland Oil, Inc., as producer, against Phillips Petroleum Company as a helium extractor, where the United States likewise intervened (hereinafter referred to as *Ashland*), the district court, adopting a work-back starting from a $20.00 refined helium price (Appendix A475) found the reasonable value of the helium constituent to be between about $11.00 and $17.00 per mcf. for the ten year period ending December 31, 1972. (Appendix A479) The district court allowed prejudgment interest upon a theory of condemnation. (Appendix A487) This judgment was obviously in excess of the amount necessary to trigger the government's indemnification responsibility under the Phillips' contract to reimburse everything over $3.00 per mcf. On appeal, the Court of Appeals affirmed this judgment, in an unpublished opinion which was later withdrawn upon the granting of petition for rehearing. (Appendix JJ)

6. On appeal to the Court of Appeals for the Tenth Circuit - consolidated hearing en banc.

An order of February 15, 1976, consolidated for *en banc* hearing the petition for rehearing in *Ashland* with

the appeals from the judgment of the trial court in the remanded *Consolidated Helium* litigation. The order also provided for filing of abbreviated statements of facts in lieu of the Record in *Consolidated Helium*. (Appendix H) The *Consolidated Helium* appeals were briefed, argued and submitted in November of 1976.

7. Judgment of Court of Appeals for the Tenth Circuit in Ashland I.

In May of 1977, the Court of Appeals issued its opinion and entered its judgment in *Ashland I* (Appendix X), affirming the trial court's allowance of prejudgment interest, not because of any condemnation theory, but because of the application of federal common law, under the "Clearfield Doctrine" (*Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). (Appendix A454) It approved the trial court's use of a work-back, but reversed and remanded for further consideration of some of the elements used in the work-back method. (Appendix A455) The Court of Appeals, however, expressly declined to extend its holding to *Consolidated Helium*. (Appendix A438) In his dissent, Judge Doyle voiced concern about the exclusive use of the so-called work-back method of valuation. (Appendix A460)

8. District Court second trial in Ashland.

Ashland was re-tried in December 1978, and the trial court (Appendix R) this time modified the work-back (Appendix A395-A397), starting it from the approximate $12.00 crude helium contract price (Appendix A421-A425), and this time found the helium constituent involved in that case had a reasonable value of $3.00,[6] but this time denied

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6. Neither the Bowers' testimony nor all of the comparable sales considered by the *Consolidated Helium* trial court were introduced in *Ashland*.

prejudgment interest on the ground the value was unliquidated. (Appendix A428) This amount is right at the point of triggering the indemnification provisions of the Phillips-United States contract. This judgment was appealed to the Court of Appeals which affirmed the trial court's judgment (Appendix Q) on October 15, 1979 although reinstating prejudgment interest, on the ground its previous mandate had not left the matter to the discretion of the trial court. (Appendix A389)

9. Consolidated Helium pends for 4-1/2 years then starts up again.

In the meantime, *Consolidated Helium* remained under submission and without any order of disposition, from November 1976, until May 11, 1981, when the Court of Appeals entered an order advising the parties that *Consolidated Helium* had been abated after its earlier submission;[7] that the *en banc* status was terminated; and, that *Consolidated Helium* would be argued to a three judge panel in August 1981. It ordered consolidation for hearing with the prejudgment interest issue in another *Ashland* appeal. These Petitioners thereupon filed petition for reconsideration and asked for the reassignment to the *en banc* Court. (Appendix HH) This petition was never ruled upon.

10. $2.00 issue first injected at the appellate level.

The contention that the producers were entitled to a judgment of reasonable value of helium in the amount of $2.00 per mcf at the wellhead was raised for the first time in briefs filed in the Court of Appeals. It was argued that, in the negotiations leading to the 1961 extraction contract, the government had included in its cost build-up a $2.00 payment, and that this constituted "money had and re-

7. No docket entry shows any such order of "abatement".

ceived" by the extractors to the use of the Producers. Since no issue had been raised at the trial court level, Petitioners, however, had no opportunity to introduce evidence to refute this contention. Further, neither the contracts themselves nor the evidence supported this contention. (Appendix A239) Petitioners' motion to bring up the entire record for review was denied. (Appendix J)

11. The earlier contract negotiations with the United States.

The background of the $2.00 third party beneficiary issue is that to support its position in the earlier negotiations, the government had developed its own cost build-up, calculating the estimated unit cost of extracting helium in a government plant, and added an amount to cover taxes, insurance and other costs applicable to a private plant, plus a 6-1/2% annual rate of return, after taxes, on the undepreciated plant investment. As a cost item in a government plant, the government included a helium payment of $2.00 per mcf for recoverable helium in the processed natural gas, together with a payment for fuel gas and shrinkage occasioned by processing. (Appendix A292-A293) Petitioners did not agree and were never asked to agree to the cost build-up on the government's side. (Appendix A293-A294) They asserted title to the helium constituent in the natural gas stream, and were willing to warrant such title unconditionally. The Bureau of Mines always considered that the owner of the gas stream also owned the helium therein. (Appendix A674) The final written contract makes no reference to the government cost build-up, any third party beneficiary contract, or the so-called helium payment of $2.00. (Appendix A239)

12. Consolidated Helium II - the decision below.

The Court of Appeals in November 1981, entered its judgment affirming in part and reversing in part the trial court decision. (Appendix A) It held that under the doctrine of "law of the case" the Petitioners were bound by the *Ashland* ruling, which required the exclusive use of the secondary valuation method of work-back, and the rejection of the value evidence, including comparable sales, considered by the *Consolidated Helium* trial court, because it was the same type of evidence considered and rejected in the Oklahoma litigation where the use of the work-back had been approved. (Appendix A12-A13) The Court treated the United States as the real party in interest (Appendix A9, A26), despite the fact this Court had earlier held these actions were between private litigants and only involved an action in quantum meruit governed by state law.[8] It further found to exist an implied contract between the United States and Petitioners under which Lessee-Producers were third party beneficiaries entitled to receive from Petitioners $2.00 of the amount per mcf of helium paid by the government to Petitioners. (Appendix A15-A24) Moreover, applying federal common law, the Court allowed prejudgment interest. (Appendix A26)

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8. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974). The Court of Appeals construed *Phillips* as having decided only the jurisdictional question, not what law to apply.

REASONS FOR GRANTING THE WRIT

1. Petitioners have been denied due process of law by (1) the abatement order, (2) by termination of the en banc Court, and, (3) by the application of the Ashland decision as the law of the case.

The trial court in *Consolidated Helium*, upon consideration of the evidence, found and concluded that the reasonable value of the helium constituent was $.60 to $.70 per mcf over the 10 year period ending December 1972. (Appendix A105) The findings were supported by the evidence. Rule 52(a) Fed. R. Civ. P. Appeals from this judgment were argued and submitted to the *en banc* Court of Appeals for the Tenth Circuit in November 1976. At some time thereafter, those appeals were, without notice to Petitioners, abated, but the Court's order of abatement was never announced to the parties until May 11, 1981, in an order which also announced the termination of the *en banc* Court. (Appendix H)

Petitioners promptly filed a petition for reconsideration, and for stay order (to allow review by this Court), addressed to the Court *en banc*. (Appendix HH) Such petition pointed out that Petitioners had never been given notice of any abatement order, and that the *Ashland* holdings were inapplicable to *Consolidated Helium*. It pointed out that no court rules permitted termination of an *en banc* Court after submission, and raised substantial questions about the fairness of such practice. To Petitioners' knowledge, no disposition was ever made of this petition. The Court below never explained its procedure, nor why, having once (February 15, 1976) found it necessary to convene an *en banc* Court to which the case was submitted, it was desirable to terminate that Court, four and 1/2 years later.

It was not until the judgment of the Court of Appeals (November 1981) that it became clear that the abatement had been for the purpose of employing only one district court (the *Ashland* Court) to develop specific guidelines to resolve the valuation question in *Consolidated Helium.*[9] (Appendix A4) By that time, however, it was too late for Petitioners to protect their rights by intervention in *Ashland, Ashland II* having already been decided. Moreover, since May 11, 1981, Petitioners have learned that the Clerk reported these appeals to the Judicial Administrator as having been terminated by remand on March 15, 1978. The Administrator's records reflect the reappearance of the appeals on May 11, 1981. The *en banc* termination, unexplained, at the least raises a perception of unfairness. When this is coupled with the abatement of the appeals without notice to permit other litigation to develop guidelines on the value of helium, a clear violation of due process appears.

It is violation of due process to use other litigation to bind Petitioners, who, not having been parties, did not have a chance to present their evidence and arguments. See *Hansberry v. Lee,* 311 U.S. 32 (1940); *Blonder-Tongue Labs v. University Foundation,* 402 U.S. 313, 329 (1971); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

Although *Ashland* and *Consolidated Helium* were consolidated on appeal for hearing in November 1976, such consolidation does not merge two suits into one, or make parties of one suit parties of the other. *Johnson v. Manhattan R. Co.,* 289 U.S. 479, 496, 497 (1933). The facts

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9. The Court of Appeals in *Ashland II* had earlier disclaimed any intent to resolve the valuation issue in *Consolidated Helium.* The Court said, "The *Grounds* case is again before this Court *en banc* and was consolidated for hearing with this case, *but is not considered in this opinion.* (Appendix A442) (Emphasis supplied)

in the two cases are different. A different gas stream with a greater helium content, different parties, different valuation evidence, and different negotiations with the government were before the Court in *Ashland;* Phillips, the defendant Helex Company in *Ashland,* is a Lessee-Producer in Consolidated Helium.

Petitioners are not in privity with the parties in *Ashland,* since they have not acquired an interest in the subject matter of the judgment through or under one of the parties. *Wells v. Davis,* 226 Kan. 586, 589, 603 P.2d 180 (1979).

Nor will collateral estoppel be applied unless it appears that the party against whom it is asserted had a full and fair opportunity to litigate the issue in the other case and that the application would not result in injustice. *Rachal v. Hill,* 435 F.2d 59 (5th Cir. 1970).

2. Allowing $2.00 issue to be raised for the first time on appeal violated due process.

Raised for the first time on appeal, the Court below held that of the approximate $12.00 per mcf of crude helium paid Petitioners by the United States under the written conservation contract, $2.00 was "money had and received" by Petitioners to the use of the Lessee-Producers. Generally, a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff,* 428 U.S. 106 (1976). This rule is "essential in order that parties may have the opportunity to offer all of the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering,* 312 U.S. 555, 556 (1941).

These Petitioners were surprised and thus foreclosed from the opportunity to introduce the evidence and the defenses they believe relevant to the issues. In this, they were denied due process. As this Court, in *Singleton*, supra, said (p. 120 of U.S.): "We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it."

3. The question of intent should have been left to the District Court.

The general rule is that a third party obligation must be apparent from the express provisions of the contract, and the benefit accruing to the third party cannot be incidental but must be a direct benefit intended by the contracting parties to accrue in favor of the third party. *Jett v. Phillips Associates,* 439 F.2d 987, 991 (10th Cir. 1971); *Martin v. Edwards,* 219 Kan. 466, 548 P.2d 779 (1976), Syl. No. 6; Sec. 145, *Restatement, Contracts* (1932).

The question of intent with respect to which there is a material dispute is a question for the District Court. *United States v. Nationwide Mutual Insurance Co.,* 499 F.2d 1355 (9th Cir. 1974); *United States v. Kansas Gas and Electric Company,* 287 F.2d 601 (10th Cir. 1961); *Evenson v. Pubco Petroleum Corporation,* 274 F.2d 866 (10th Cir. 1960). The District Court, which had heard the witnesses, had twice found no third party beneficiary

rights under the Northern Helex-United States contract (Appendix A100, A211), although the *$2.00* third party beneficiary issue was raised for the first time on appeal.

4. The Court of Appeals for the Tenth Circuit failed to consider the objective manifestations of Petitioners' intent.

Contracts are the products of shared intentions, and a promisor should be bound only by those objectively manifested intentions of the promisee to which the promisor has implicitly or explicitly assented. It is improper to neglect the reasonable expectations of the promisor. *Holbrook v. Pitt*, 643 F.2d 1261, 1270-1271, fn. 17 (7th Cir. 1981).

Petitioners and the government, being sophisticated and well supplied with legal advisors, knowledgeable of the policy and intent of Congress expressed in the Helium Act Amendments of 1960, and cognizant of the economic and technological risks entailed in constructing and operating an "economy of scale" extraction plant, could not possibly have intended that a third party beneficiary contract exist in the face of the written contract. There is simply nothing in the negotiations to indicate the parties intended that the $2.00 which the United States may have used in its cost build-up would be paid to Petitioners for the use of third parties. Petitioners believed they had purchased the full gas stream at the wellhead, and contemplated that they would not be required to pay anybody anything. They were extremely cost conscious.

Among other things, this is shown by the fact that the Department of the Interior, in order to get industry participation in the Conservation Program, found it necessary to include Section 11 in the Helium Act Amendments of 1960. Henry Wheeler, who negotiated the contract for

the United States, testified: "We were interested in attracting private industry participation . . . [and] in order to do this we had to provide an adequate profit motivation to the companies that would be commensurate with the risks that they would take in the helium program . . . We didn't think we could get industry participation if the companies could make only a public utility rate of return on their investment." (Appendix A674).

Under the surrounding circumstances, and the fact that the contract that arose out of the negotiations, and into which the negotiations were merged, does not even mention a $2.00 figure or third party beneficiary provision (Appendix A239) it follows there was no intent that any part of the price received by Petitioners for their helium would be given to third parties.

5. Negotiations were merged into the written contract and may not be separately enforced by promisor, promisee or third parties.

The implied contract, found by the Court of Appeals, has been inferred from the government's contract negotiation posture. But preliminary negotiations are inadmissable to vary or contradict the terms of a valid, plain and unambiguous written contract, and they are merged and integrated into the written instrument. *Evenson v. Pubco Petroleum Corporation,* 274 F.2d 866, 871-872 (10th Cir. 1960); 17 Am. Jur. 2d, *Contracts,* Secs. 260, 281. Here, the Court of Appeals for the Tenth Circuit did not seek to construe the unambiguous Northern Helex-United States contract. Rather it rewrote the contract for the parties. But express contracts should be enforced, not rewritten by the courts. *Barby v. Cabot Corporation,* 465 F.2d 11 (10th Cir. 1972) The Court refused to engage in a careful scrutiny of the facts in the Record (Appendix J), or re-

mand for further enquiry, but simply adopted wholesale the argument made for the first time on appeal.

6. The holding of the Court of Appeals, by not permitting Northern Helex Company its costs in any valid work-back, confiscates its property without due process of law.

Even if the Court was correct in reversing and remanding for a work-back,[10] it has so distorted this secondary valuation device, by establishing a $2.00 floor, as to confiscate Petitioners' property. According to Petitioners' books, its average rate of return was only 6.7% after taxes. Its net profit after taxes per mcf of helium sold to the United States (includes rate of return) ranged from about 68 cents in 1963 to a little over $2.00 in 1970. (Appendix A53) Thus, allowing Lessee-Producers to recover a minimum of $2.00 per mcf of helium automatically results in confiscation of Petitioners' property.

A work-back which does not allow a recoupment of investments and a fair rate of return thereon, together with all operating costs, is unfair, arbitrary, capricious and confiscating. This one does not do so. This is true because the *value* it prescribes to the contained helium at the wellhead is necessarily *and arbitrarily* greater than the actual value at that point, because of the $2.00 floor which includes Petitioners' *cost and rate of return* on investment. This work-back takes private property by assigning an arbitrary and fallacious value to the helium in question. In giving Lessee-Producers a greater share than they are entitled to, it violates due process of law. *Federal Power Com. v. Nat. Gas Pipeline Co.*, 315 U.S.

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10. Any work-back, *per se*, is inherently unfair and punitive because it penalizes efficiency.

575 (1942); *United R. & Electric Co. v. West*, 280 U.S. 234 (1930); *Bluefield W.W. & Improv. Co. v. Public Service Com.*, 262 U.S. 679 (1923).

7. The application of federal common law to allow prejudgment interest denied due process.

Under *state* law, including Kansas, prejudgment interest is ordinarily not allowed, if, as here, the amount in litigation is not liquidated. See *Columbian Fuel Corporation v. Panhandle Eastern Pipe Line Company*, 176 Kan. 433, 271 P.2d 773 (1954). See also, *Wolfe v. Texas Co.*, 83 F.2d 425 (10th Cir. 1936); *Leader Clothing Co. v. Fidelity & Casualty Co. of N.Y.*, 237 F.2d 7 (10th Cir. 1956); *Palmer v. Radio Corporation of America*, 453 F.2d 1133, 1140 (5th Cir. 1971). Since the Helex Companies have asserted good faith and persuasive title claims to the commingled helium, and since the value of helium has remained in dispute, the amount in controversy is clearly unliquidated.

This is simply a suit for reasonable value in an action in quantum meruit whose source is state law not federal law. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974). But the Court below, applying *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) so as to require the use of federal common law, has awarded Lessee-Producers prejudgment interest.

However, the most recent decisions of this Court have made it clear that the historic police powers of the states are not to be superseded or pre-empted by the Federal common law in the absence of the clear and manifest purpose of Congress. See *Milwaukee v. Illinois*, ... U.S. ..... 68 L.Ed. 2d 114, 126 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ... U.S. ....., 68 L.Ed. 2d 500 (1981);

Northwest Airlines v. Transport Workers, ... U.S. ....., 67 L.Ed. 2d 750, 757 (1981). Under the dictates of *Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125 (1974), here there is no uniquely federal interest justifying the imposition of federal common law and the pre-emption of state law. To deny Petitioners the benefits of the application of state law is to deny them due process.

8. Proper reconciliation of the Natural Gas Act and the Helium Act Amendments of 1960 can be had without abrogating the price provisions of the Gas Purchase Contract.

There is no "void" into which the producers of helium bearing gas fall because of the interaction between the Natural Gas Act and the Helium Act Amendments. (Appendix A167) The legislative history of the Helium Act Amendments clearly shows that Section 11 was intended to apply to "helium" as such, as distinct from helium bearing natural gas, over which the FPC (now FERC) exercises jurisdiction, under the Natural Gas Act. (106 Cong. Rec. 18603) The clear language of the statute, itself (Appendix 283), as fortified by the legislative history, shows that Congress meant to encourage private enterprise under the Helium Act Amendments and at the same time permit the Federal Power Commission to exercise jurisdiction over the full stream (not just 99.6% thereof). This sensible construction was adopted by the Eighth Circuit in *Panhandle Eastern Pipe Line Co. v. Federal Power Com'n,* 359 F.2d 675 (8th Cir. 1966). It is confirmed again by *Henry v. F.P.C.,* 513 F.2d 395 (C.A. D.C. 1975) where the Court at page 404, discussing the Eighth Circuit decision in *Panhandle,* supra, states:

> "In that case, the Court sustained the FPC's exercise of jurisdiction over natural gas bearing helium though it had no jurisdiction over helium. . ."

If this construction is adopted by this Court, then the contracts between producer and pipeline control, and this litigation is at an end, because all of the courts which have examined the question have held that the gas purchase contracts covered the helium.

Even if the FPC could no longer exercise jurisdiction over the full gas stream after the passage of the Helium Act Amendments, this should not have nullified existing contracts. The parties were then free to contract with respect to the helium content as they chose, unimpeded by the Natural Gas Act. Although in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974), this type of action was characterized as an action in quantum meruit, it is a complete defense to assert a written contract coextensive with the implied contract. *Wolfe v. Prairie Oil & Gas Co.*, 83 F.2d 434 (C.A. 10, 1936); *Falls Sand and Gravel Co. v. Western Concrete, Inc.*, 270 F. Supp. 495 (D.C. Mont. 1967); *Restatement, Restitution*, §107. See also *Barby v. Cabot Corporation*, 465 F.2d 11 (C.A. 10, 1972) to the effect that express contracts should be enforced, not rewritten by the courts. It necessarily follows that in those instances where the contract price exceeded the FPC rate, the Lessee-Producers have not been deprived of any portion of the amount for which they bargained and agreed upon.

Either of the foregoing two alternative constructions would leave the contracts as they are, the first allowing FPC jurisdiction over them to continue without abrogation except where public convenience and necessity requires, *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1955), the second, not permitting FPC jurisdiction over the helium constituent.

However, the effect of the judgment of the Court of Appeals for the Tenth Circuit is to allow Lessee-Producers

to participate in the profits from a newly developed use of the constituents of the gas stream by the long-term purchaser thereof, notwithstanding they had lawfully sold and been paid for such product under valid gas purchase contracts. See, e.g., *Utilities Production Corporation v. Carter Oil Co.*, 72 F.2d 655 (C.A. 10, 1934). The Court's judgment (liability) abrogates those contracts. The judgment should be reviewed so as to effect a proper reconciliation which will not abrogate such contracts.

CONCLUSION

The Petition for Certiorari should be granted for the foregoing reasons.

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